

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**JESSICA CHAVEZ,
RESPONDENT
vs.**

**CEDAR FAIR, LP,
APPELLANT**

DOCKET NUMBER WD75373

DATE: JULY 16, 2013

Appeal from:

The Circuit Court of Clay County, Missouri
The Honorable Anthony Rex Gabbert, Judge

Appellate Judges:

Division Three: Joseph M. Ellis, P.J., Lisa White Hardwick and Cynthia L. Martin, JJ.

Attorneys:

Steven L. Hobson, for Respondent

David R. Frye, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

JESSICA CHAVEZ, RESPONDENT

v.

CEDAR FAIR, LP, APPELLANT

WD75373

Clay County, Missouri

Before Division Three Judges: Joseph M. Ellis, P.J., Lisa White Hardwick and Cynthia L. Martin, JJ.

In 2000, Respondent Jessica Chavez, then twelve years old, visited Oceans of Fun Water Park, which is owned and operated by Cedar Fair, LP. Shortly after arriving, Respondent and some of her family proceeded to the Hurricane Falls raft ride. When the circular raft in which Respondent was seated maneuvered the ride's final turn, Respondent and her cousin, who was sitting directly opposite of Respondent in the raft, collided, and her cousin's head hit Respondent in the mouth. As a result of the impact, Respondent lost a tooth and suffered other injuries that required significant dental work to correct.

In 2005, Respondent filed a petition alleging Cedar Fair was negligent in that Hurricane Falls was unsafe when operated as intended because it lacked adequate safety devices for the protection of its passengers and failed to adequately warn passengers about the risk of body-to-body contact. Ultimately, the case was tried to a jury, which returned a \$225,000 verdict in favor of Respondent. On appeal, Cedar Fair raised four points of error.

AFFIRMED

Division Three holds:

(1) The trial court did not err by instructing the jury that negligence "means the failure to use the highest degree of care" because amusement park operators can be held to the highest degree of care as long as that higher degree of care is commensurate with the particular conditions and circumstances involved in a given case. This case involved Respondent alleging that her injuries resulted from Cedar Fair's negligent operation of Hurricane Falls, over which Cedar Fair had complete control and its patrons, such as Respondent, depended upon Cedar Fair for their safety. Under such circumstances, Cedar Fair had a duty to operate Hurricane Falls with the highest degree of care. Accordingly, the jury was properly instructed that Cedar Fair was required to exercise the highest degree of care in its operation of Hurricane Falls.

(2) The trial court did not abuse its discretion by rejecting Cedar Fair's proposed comparative fault instruction because although there was evidence in the record that Respondent let go of the straps, there was no evidence whatsoever as to whether she did so in a way that would constitute negligence. Without such evidence, the jury could only speculate as to whether Respondent negligently let go of the straps; thus, the trial court did not err by refusing to submit a comparative fault instruction to the jury.

(3) Cedar Fair failed to preserve the issue of whether the trial court abused its discretion by excluding evidence regarding ridership on Hurricane Falls because Cedar Fair made no offer of proof regarding what evidence of ridership it intended to introduce at trial and without such offer, we cannot determine what evidence Cedar Fair is contended the trial court erroneously excluded or whether such evidence was relevant or admissible at trial.

(4) The trial court did not err in allowing Respondent's expert William Avery to testify. Avery, a safety consultant, testified as to his expertise in the amusement park industry as well as the process he took to evaluate the safety of the Hurricane Falls ride, which included him observing the ride in operation, reviewing the signs posted on the property, reading depositions, looking at the manual from the manufacturer of the ride, reviewing incident reports from the water park and its other sister water parks, and reviewing all other material produced during discovery. It was from his evaluation and expertise in the field that Avery formed his opinion that Cedar Fair failed to exercise the highest degree of care in operating Hurricane Falls. Thus, Avery's opinion was not so fundamentally unsupported as to render his opinion inadmissible. Avery's testimony, therefore, was admissible at trial.

Opinion by Joseph M. Ellis, Judge

Date: July 16, 2013

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